

Before the
Federal Communications Commission
Washington, D.C. 20554

NOV 24 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

MM Docket No. 95-154

CONTEMPORARY MEDIA, INC.

Licensee of Stations WBOW(AM), WBFX(AM),
and WZZQ(FM), Terre Haute, Indiana

Order to Show Cause Why the Licenses for
Stations WBOW(AM), WBFX(AM), and
WZZQ(FM), Terre Haute Indiana, Should Not
be Revoked

CONTEMPORARY BROADCASTING, INC.

Licensee of Station KFMZ(FM), Columbia,
Missouri, and Permittee of Station KAAM-FM,
Huntsville, Missouri (unbuilt)

Order to Show Cause Why the Authorizations
for Stations KFMZ(FM), Columbia, Missouri,
and KAAM-FM, Huntsville, Missouri, Should
Not be Revoked

LAKE BROADCASTING, INC.

Licensee of Station KBMX(FM), Eldon,
Missouri, and Permittee of Station KFXE(FM),
Cuba, Missouri

Order to Show Cause Why the Authorizations
for Stations KBMX(FM), Eldon, Missouri, and
KFXE(FM), Cuba, Missouri, Should Not be
Revoked

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LAKE BROADCASTING, INC.

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File No. BPH-921112MH

For a Construction Permit for a New FM
Station on Channel 244A at Bourbon, Missouri

To: The Commission

MASS MEDIA BUREAU'S REPLY TO EXCEPTIONS

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November 24, 1997

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
SUMMARY	iv
I. Preliminary Statement	1
II. Questions Presented	3
III. Argument	3
A. Revocation Is Warranted Based on the Felony Convictions of The Sole Stockholder of the Licensees for Crimes Involving the Sexual Abuse of Children	3
B. There Are No Factors Sufficient to Mitigate The Concerns That Arise From Rice's Egregious Misconduct	8
C. Revocation Is Warranted Based on the Licensees' Misrepresentation/ Lack of Candor	11
D. Revocation of the Licensees' Authorizations is not Subject to Review under the Eighth Amendment	15
IV. Conclusion	19

TABLE OF AUTHORITIES

<u>Allessandro Broadcasting Co.</u> , 99 FCC 2d 1 (Rev. Bd.1984) <u>modifying in pertinent part</u> 99 FCC 2d 12 (ID 1984)	10
<u>Austin v. United States</u> , 509 U.S. 602 (1993)	15, 16
<u>Character Policy Statement</u> , 5 FCC Rcd 3252 (1990)	2, 8, 14
<u>Character Qualifications</u> , 102 FCC 2d 1179 (1986)	1, 2, 4, 8
<u>Conair Corporation v. NLRB</u> , 721 F. 2d 1355 (D.C. Cir. 1983)	12
<u>Doe v. Pataki</u> , 120 F.3d 1263 (2d Cir. 1997)	9
<u>FCC v. WOKO, Inc.</u> , 329 US 223 (1946)	15
<u>Hara Broadcasting, Inc.</u> , 8 FCC Rcd 3177 (Rev. Bd. 1993)	5
<u>Harmony v. United States</u> , 43 U.S. (2 How.) 210, 11 L.Ed. 239 (1844)	16
<u>J.W. Goldsmith, Jr.-Grant Co. v. United States</u> , 254 U.S. 505, 41 S. Ct. 189 (1921)	16
<u>Office of Communication of United Church of Christ v. FCC</u> , 359 F.2d 944 (D.C. Cir. 1966)	17
Section 301 of the Communications Act of 1934, as amended	17
Section 312 of the Communications Act of 1934, as amended,	16
Sections 307(a), 309(a) of the Communications Act of 1934, as amended	17
<u>Syracuse Peace Council v. FCC</u> , 867 F.2d 654, 276 U.S. App. D.C. 38 (1989).	17
<u>The Kravis Co.</u> , 11 FCC Rcd 4740 (1996)	5

<u>The Palmyra</u> , 25 U.S. (12 Wheat.) 1, 6 L.Ed. 531 (1827).	16
<u>The Petroleum V. Nasby Corp.</u> , 9 FCC Rcd 6072 (I.D. 1994), <u>aff'd in part and modified in part</u> , 10 FCC Rcd 6029, <u>recon. granted in part</u> , 10 FCC Rcd 9964 (Rev. Bd. 1995), <u>remanded on divestiture requirement</u> , 11 FCC Rcd 3494 (1996), <u>summary decision</u> , FCC 97D-04, released March 24, 1997 . . .	6, 11
<u>Tri-State Broadcasting Co., Inc.</u> , 5 FCC Rcd 1156 (Rev. Bd. 1990)	12
<u>United Broadcasting Co.</u> , 100 FCC 2d 1574 (1985)	18
<u>Walton Broadcasting, Inc.</u> , 78 FCC 2d 857, <u>recon. denied</u> 83 FCC 2d 440 (1980), <u>aff'd</u> <u>without opinion</u> 679 F.2d 263 (D.C. Cir. 1982)	7
<u>WHW Enterprises, Inc. v. FCC</u> , 753 F. 2d 1132 (D.C. Cir. 1985)	12
<u>Wilkett v. ICC</u> , 710 F.2d 861 (D.C. Cir. 1983)	3, 4
<u>Williamsburg County Broadcasting Corp.</u> , 5 FCC Rcd 3034 (1990)	4, 7

SUMMARY

1. The Initial Decision of Administrative Law Judge Arthur I. Steinberg, FCC 97D-09, released August 21, 1997 ("ID") found that revocation of the Licensees' authorizations is warranted based on the felony convictions of their sole stockholder, Michael Rice. Rice's convictions arose from twelve instances of the sexual exploitation of five children over a period of five years. ID, para. 10-14. Rice's predatory conduct with respect to children is of the type that can only be found "so egregious as to shock the conscience and evoke almost universal disapprobation." Character Qualifications, 102 FCC 2d 1179, 1205 n. 60 (1986). Rice's convictions, and the absence of significant mitigating factors, support a conclusion that the Licensees do not have the "requisite propensity to obey the law." Character Policy Statement, 5 FCC Rcd 3252 (1990). Rice's convictions clearly support a determination that the Licensees -- which are wholly owned by Rice -- are unqualified and that their authorizations should be revoked.

2. Following Rice's arrest, the Licensees reported to the Commission that Rice had been excluded from the stations' management. The Licensees concede that Rice subsequently became involved in station affairs to an extent that rendered their initial report inaccurate. However, the Licensees in later reports did not candidly disclose the changes. Further, substantial evidence indicates that Rice had a significantly greater role, particularly in the areas of programming and personnel, than the Licensees concede. The record reflects that, even prior to Rice's convictions, the Licensees were aware of the potential impact of his misconduct on the stations' licenses, which was a factor in his purported exclusion from the stations' affairs. When he was subsequently convicted, Rice's alleged noninvolvement was used by the Licensees as a

basis for urging, prior to designation, that no revocation hearing was warranted. They had a clear motive, therefore, to conceal the true extent of Rice's involvement. The attempted concealment of the full facts concerning Rice's involvement evidences misrepresentation and lack of candor that provides a second and independent basis for revocation of the Licensees' authorizations.

3. Revocation of the Licensees' authorizations would not violate the excessive fines clause of the Eighth Amendment to the Constitution. The revocation of a license pursuant to Section 312 of the Communications Act of 1934, as amended, is not a punitive measure but is designed to protect the public interest. Moreover, the Licensees have no property interest in the licenses and permits themselves. The Licensees have not demonstrated that any result other than revocation of their authorizations will adequately protect the public.

MASS MEDIA BUREAU'S REPLY TO EXCEPTIONS

I. Preliminary Statement

1. The Mass Media Bureau, pursuant to Sections 1.276 and 1.277 of the Commission's Rules, hereby replies to the Exceptions and Brief of Contemporary Media, Inc; Contemporary Broadcasters, Inc.; and Lake Broadcasting, Inc. (the "Licensees"). The Licensees except to the Initial Decision of Administrative Law Judge Arthur L. Steinberg, FCC 97D-09, released August 21, 1997 ("ID"). Contrary to the Licensees, the Bureau fully supports the resolution of the issues reached in the ID.

2. The ID found that revocation of the Licensees' authorizations is warranted based on the felony convictions of their sole stockholder, Michael Rice. The Licensees in their Preliminary Statement characterize Rice's convictions as involving "sexual misconduct." Licensees' Exceptions at para. 2. However, Rice's behavior was in fact far more egregious than the Licensees' characterization suggests. Specifically, it involved twelve instances of the sexual exploitation of five children over a period of five years. ID, paras. 10-14. To characterize Rice's behavior as mere "sexual misconduct" is to trivialize it. Rather, Rice's predatory conduct with respect to children is of the type that can only be found "so egregious as to shock the conscience and evoke almost universal disapprobation," which the Commission indicated might raise questions as to a licensee's qualifications even prior to an adjudication by another body. Character Qualifications, 102 FCC 2d 1179, 1205 n. 60 (1986) ("CPS-1"); ID, para. 148. It clearly supports a determination that the Licensees -- which are wholly owned by Rice -- are

unqualified and that their authorizations should be revoked. CPS-1; Character Policy Statement, 5 FCC Rcd 3252 (1990) ("CPS-2").

3. The ID also found that revocation is warranted based on misrepresentation and lack of candor arising from Rice's arrest and conviction. In this regard, as a result of Rice's arrest, the Licensees reported to the Commission that Rice would have "absolutely no managerial, policy, or consultative role" in the affairs of the Licensees. Initially, this was true because Rice was hospitalized for approximately six months as a result of his arrest. It is undisputed, though, that Rice, after he was released from his hospitalization, assumed certain limited roles in the stations' affairs and the Licensees recognized that their original representation required modification. However, the only modification made was to delete the reference to Rice's having no "consultative" role. ID, para. 44. No disclosure was made of the roles Rice in fact had, and it was stated in one report that there was "no change in Mr. Rice's status" with respect to one of the Licensees as a result of his release from the hospital. ID, para. 36-38. Moreover, according to the testimony of former employees of the Licensees, Rice in fact had a far more extensive involvement in the affairs of the stations than that conceded by the Licensees. The ID correctly rejected the Licensees' contention that this testimony should not be believed.

4. The ID properly resolved the misrepresentation/lack of candor issue adversely to the Licensees. The representations made concerning Rice's non-involvement in station affairs were clearly designed to address expected Commission concern as to the criminal charges against Rice. However, when the circumstances concerning Rice's involvement changed, the Licensees failed to disclose even that which the Licensees recognized should have been disclosed. In this regard, the Licensees had a logical motive for concealing the actual extent of Rice's involvement

for the reasons stated at ID, para. 192. Thus, the ID's conclusion that Rice's involvement exceeded that conceded by the Licensees should be affirmed.

5. Finally, the Licensees have identified no basis for rejecting the ALJ's conclusions as to the credibility of the witnesses. The Commission should defer to the ALJ, who actually observed the witnesses and was in the best position to assess their credibility.

II. Questions Presented

6. The Licensees raise the following questions:

A. Whether CPS-1&2 are arbitrary, capricious, and unlawful as applied herein based on the Licensees' contention that there is no relationship between Rice's felonious misconduct and the stations' broadcast operations, their compliance with Commission rules and policies, or their propensity to be truthful with the Commission;

B. Whether Rice's criminal convictions involving the sexual abuse of children warrant revocation of all the Licensee's authorizations;

C. Whether the Licensees intentionally lacked candor or deliberately misrepresented facts to the Commission concerning Rice's role at the stations, warranting revocation of their authorizations;

D. Whether the revocation of all of the Licensees' authorizations violates the Excessive Fines Clause of the Eighth Amendment.

III. Argument

A. Revocation Is Warranted Based on the Felony Convictions of The Sole Stockholder of the Licensees for Crimes Involving the Sexual Abuse of Children

7. The Licensees contend at paragraph 13 of their Exceptions that Rice's egregious misconduct is unrelated to his broadcast operations and therefore should not bar his holding broadcast licenses. Principal reliance is placed on Wilkett v. ICC, 710 F.2d 861 (D.C. Cir. 1983) ("Wilkett"). In Wilkett, the Court reversed a decision of the ICC denying authorization to transport coal to a company owned by an individual who had been convicted of conspiracy to

distribute a controlled substance and second degree murder. The Court held that this was improper in the absence of evidence of trucking related misconduct, and also found it inconsistent with past ICC actions. Under the applicable statute, the ICC was required to find only that the operator was "fit, willing and able to perform the service proposed" and that the service proposed was in the public interest. Wilkett, 710 F.2d at 863.

8. The circumstances pertaining to a broadcast licensee are radically different, as the Commission recognized in Williamsburg County Broadcasting Corp., 5 FCC Rcd 3034, 3035 (1990) ("Williamsburg"). In Williamsburg, the Commission found that felonious drug trafficking was the type of egregious misconduct that would warrant Commission concern even prior to adjudication pursuant to footnote 60 of CPS-1 because it entailed:

". . . such callous disregard for the welfare of fellow citizens as to place at issue the perpetrator's qualifications to be or remain a broadcaster. A doubt certainly exists as to whether someone recently found guilty of such an egregious crime against society would faithfully serve the public in exercise of the vast and important discretion that this agency entrusts to licensees." 5 FCC Rcd at 5035 (Footnote omitted).

The Commission rejected the reliance of the licensee in that case on Wilkett, finding that the authorization of a motor carrier despite a drug-related conviction did not dictate that a conviction for drug trafficking would be irrelevant to the qualifications of a broadcast licensee. Rice's convictions for crimes involving the sexual abuse of children over a long period of time are no less egregious than drug trafficking and are sufficient to support a conclusion that Rice does not have the requisite character to hold Commission authorizations.

9. The Licensees also claim that revocation of their authorizations based on Rice's convictions would be inconsistent with precedent. They assert that disqualification has not resulted in other cases involving "felonious sexual misconduct." Licensees' Exceptions at para.

14. However, disqualification is warranted in this case not because Rice's convictions involved "felonious sexual conduct," but because they involved the felonious systematic, repeated and long-term sexual abuse of children. The only case cited by the Licensees that expressly discusses a conviction involving "sexual conduct" is Hara Broadcasting, Inc., 8 FCC Rcd 3177 (Rev. Bd. 1993). That case arose from a conviction involving sexual conduct between adults. The circumstances are therefore wholly unlike those here. Thus, the Licensees have not demonstrated that the ID is inconsistent with precedent since there is a distinction between crimes involving adult sexual conduct and those involving the sexual abuse of children.

10. The Licensees also cite The Kravis Co., 11 FCC Rcd 4740 (1996). The Commission therein granted renewal for two stations. The decision itself did not address any character questions. In a pleading below¹, the Licensees submitted a 1991 letter from counsel for the licensee in that proceeding reporting that a principal had been involved in a criminal proceeding that resulted in the principal being placed on four years' probation without entry of a judgment of guilt. Under the pertinent procedure, the charges against the principal would be expunged if he successfully completed his probation. The Commission did not act on the renewal applications until 1996, well after the four year probation period. The Licensees have submitted no evidence that, prior to the grant of the renewals, the Kravis principal failed to successfully complete his probation or that the charges were not expunged. Accordingly, there were no pending matters or conviction for the Commission to consider.

¹ See "Licensees' Proposed Findings of Fact and Conclusions of Law" filed September 8, 1996, Attachment A.

11. The Licensees further contend that the ID erred in attributing Rice's misconduct to them, citing The Petroleum V. Nasby Corp., 9 FCC Rcd 6072 (I.D. 1994), aff'd in part and modified in part, 10 FCC Rcd 6029, recon. granted in part, 10 FCC Rcd 9964 (Rev. Bd. 1995), remanded on divestiture requirement, 11 FCC Rcd 3494 (1996), summary decision, FCC 97D-04, released March 24, 1997 (collectively "Nasby"). In that case, the Commission found that a renewal applicant might be qualified for renewal notwithstanding the misconduct of a minority stockholder provided that the wrongdoer were wholly removed not only as a stockholder but also from any position of potential influence with respect to the licensee. Here, Rice is the sole stockholder of the Licensees and there is no proposal to remove him from that status or even to place any binding legal restrictions on the exercise of his ownership rights. Since his arrest, Rice has been, to some extent, excluded from station operations pursuant to actions of the Licensees' boards. However, this arrangement obviously exists solely at the whim of Rice, who remains the sole stockholder of the Licensees and therefore could, if he wished, ultimately override any decision by other "principals" to restrict his role. Indeed, there are no other "principals" of the Licensees, except at Rice's sufferance. There is accordingly no basis for recognizing any distinction between Rice and the Licensees. Indeed, the Commission previously rejected the Licensees' reliance on Nasby in the Order To Show Cause and Notice of Apparent Liability in this proceeding, 10 FCC Rcd 13685, 13688 (1995) ("OSC"). Nothing in the record warrants a different conclusion now.

12. The Licensees are also incorrect in contending that there is no nexus between Rice's misconduct and the stations' broadcast operations. Initially, it cannot be merely assumed that, prior to his arrest, Rice's status in the community arising from his holding of broadcast

licenses did not facilitate his efforts to prey upon children. Further, once Rice was arrested, the immediate response was the purported removal of Rice from involvement in station operations, a situation that has persisted to date. This is wholly inconsistent with any claim that Rice's misconduct was unrelated to station operations because, if it were, there would have been no need to remove him, at least during those periods when he was not hospitalized or incarcerated.

13. Moreover, as a result of Rice's purported removal, operational responsibility for the stations ostensibly rests with hired employees to the exclusion of the actual owner, Rice. This is an unnatural situation that is not conducive to broadcast operations in the public interest. Under the Commission's scheme for licensing broadcast stations, owners are ultimately accountable for making the public interest judgments that are expected of broadcast licensees. See, e.g., Walton Broadcasting, Inc., 78 FCC 2d 857, 867-68, recon. denied 83 FCC 2d 440 (1980), aff'd without opinion 679 F.2d 263 (D.C. Cir. 1982). Hired employees acting without the supervision of actual owners cannot be relied upon to exercise meaningfully the "vast and important discretion that this agency entrusts to licensees" noted in Williamsburg. Indeed, abnormal reliance on employees resulted in the Licensees' failure to candidly apprise the Commission of the facts concerning Rice's involvement, as properly found in the ID, paragraph 154.

14. Finally, even if Rice were to resume his full responsibilities as the owner of the Licensees, it is probable that the stations would be unable to provide a normal broadcast service. Because of the almost universal public disapprobation arising from Rice's sexual abuse of children, it is unlikely that Rice would be able to develop the normal interaction with the public necessary to ensure that the stations meet their needs and interests. Certainly, any interaction at

all between Rice and a sizeable segment of the public, i.e., children, would necessarily give rise to justifiable public concern. Accordingly, as a direct result of his egregious misconduct, it is improbable that Rice would ever be able to provide the best practicable service to the public. There is no justification for imposing upon the public of the communities where the stations operate a licensee that has, because of the reprehensible crimes of its sole owner, clearly forfeited any claim to the confidence of the public.

B. There Are No Factors Sufficient to Mitigate The Concerns That Arise From Rice's Egregious Misconduct

15. In CPS-1, 102 FCC 2d at 1227-29, and CPS-2, 5 FCC Rcd at 3252, the Commission stated there are mitigating factors that must be considered in an assessment of character. Although some of those factors are discussed herein, the Bureau concurs with the ALJ's analysis of evidence concerning mitigation. Id., paras. 148-153. Moreover, the issue of mitigation must be considered in light of the egregious nature of Rice's misconduct and the widespread public concern about the perpetrators of sex offences, especially those that involve preying upon children. As the Second Circuit stated in a recent decision concerning the New York "Megan's Law:"

"The seriousness of the harm that sex offenders' actions cause to society and the perception, supported by some data, that such offenders have a greater probability of recidivism than other offenders have recently combined to prompt the enactment of numerous laws across the country directed specifically toward persons convicted of crimes involving sexual conduct. Studies have shown that sex crimes are widespread . . . and that their impact on both the victim and society as a whole is devastating, see, e.g., [Brief of Amicus Curiae United States] at 5-6 (citing John Briere & Martha Runtz, Childhood Sexual Abuse: Long-Term Sequelae and Implications for Psychological Assessment, 8 J. Interpersonal Violence 312, 324 (Sept. 1993) (noting that molested children are likely to develop severe psychological problems) and Alphonse Kohn, Shattered Innocence, Psychology Today, Feb. 1987, at 54, 58 (noting that sexually abused boys are more likely than non-abused boys to become sexual offenders themselves, and that

sexually abused girls are more likely than non-abused girls to have children who are abused.))"

Doe v. Pataki, 120 F.3d 1263, 1266 (2d Cir. 1997).

16. **Seriousness of the Misconduct.** The Licensees address the mitigating factor of the seriousness of Rice's misconduct at paragraph 20 of their Exceptions. The most pertinent point concerning their position is that they refuse to acknowledge that Rice's misconduct was, indeed, serious. Rather, as elsewhere in their Exceptions, they seek to trivialize Rice's convictions in a manner that the ALJ properly rejected as speculative. ID, para. 148. Thus, contrary to the contentions of the Licensees, the misconduct was serious.

17. **Participation of Management and Owners in Misconduct.** The Licensees complain that the ALJ ignored this factor. However, as noted, Rice is the sole stockholder of the Licensees. All other "principals" and managers of the Licensee hold their positions at Rice's sufferance. Their non-involvement in Rice's misconduct is immaterial.

18. **Rehabilitation.** Notwithstanding his past misconduct involving the repeated sexual abuse of children, the Licensees urge that the Commission find him rehabilitated, despite the absence of any evidence to support such a conclusion. At paragraph 27 of their Exceptions, the Licensees fault the ID for failing to consider that Rice has been receiving treatment for a "disorder" and will be required to participate in a program mandated by the Missouri prison system under its Sexual Offender Program. However, the Commission has no evidence with which to determine that Rice has either been successfully cured of his "disorder" or that he likely will be in the future. Moreover, even if Rice's required participation in a mandatory prison treatment program is considered, there is no evidence that the successful completion of that program would necessarily equate with "rehabilitation." The circumstances here are unlike

Allessandro Broadcasting Co., 99 FCC 2d 1, 11 n. 13 (Rev. Bd.1984) modifying in pertinent part 99 FCC 2d 12 (ID 1984) (subsequent history omitted) ("Allessandro"). That case involved an isolated "crime of passion" that is wholly unlike the systematic and protracted exploitation of children at issue here. Eleven years after the offense, the individual received a formal Certificate of Rehabilitation from the court, including a recommendation that the Governor grant a full pardon. His rehabilitation was also supported by other evidence. Allessandro ID, 99 FCC 2d at 22-26. The ALJ found that disqualification was unwarranted but imposed a comparative demerit. The Board found that neither disqualification nor a comparative demerit were warranted, based on the isolated and remote nature of the misconduct as well as deference to the formal determination of the state court. None of those circumstances is present in this case.

19. **Reputation.** None of the "reputation" evidence relied upon by the Licensees does more than establish that Rice may be a competent broadcaster. It does not take into account Rice's reputation in light of the serious misconduct in which he was found to have engaged. By comparison, the reputation evidence in Allessandro included testimony by witnesses who affirmed their confidence in the principal in that case notwithstanding his conviction. Allessandro ID, 99 FCC 2d at 24-25.

20. **Measures Taken To Prevent Future Occurrence Of Misconduct.** Apart from Rice's alleged rehabilitation, discussed above, the only factor cited by the Licensees is the purported exclusion of Rice from management responsibilities for the stations. However, no significance can be attached to this consideration even if it were found that the Licensees had implemented their proposal in good faith. As noted above, Rice retains sole ownership of the Licensees and could reassert his right to direct the actual management of the stations at any time

he desired. Under Nasby, the purported removal of Rice from managerial responsibility is of no remedial significance.

**C. Revocation Is Warranted Based on the Licensees' Misrepresentation/
Lack of Candor**

21. In pre-designation reports, the Licensees claimed that Rice was excluded from station involvement. However, it is undisputed that Rice was involved in the affairs of the station in a consultative engineering role, in matters attributed to his role as the stations' landlord, and in matters relating to the potential sale or exchange of some of the Licensees' permits. The Licensees contend in Section (C) (1) of their Exceptions that the failure to affirmatively disclose these involvements was not improper because the reports filed were merely "voluntary reports pertaining to the pre-trial stages of criminal proceedings against Mr. Rice." Licensees' Exceptions at para. 32. This is without merit since the purported exclusion of Rice from the stations' affairs was a principal component in the Licensees' efforts to forestall Commission inquiry into Rice's convictions. See ID, para.192; OSC, 10 FCC Rcd at 13686, which reflects that the Licensees, in a pre-designation pleading urging that no hearing was warranted, cited Rice's exclusion from station involvement as evidence of "effective remedial action." The issue as to Rice's exclusion was therefore clearly material and full disclosure of all facts concerning the scope of Rice's activities was necessary. The gamesmanship engaged in by the Licensees in lieu of full disclosure was clearly deceptive. ID, para. 169. This would be true even considering only those aspects of Rice's involvement that are not in dispute. In any event, the ID properly found that Rice's involvement extended well beyond the areas that are not in dispute. Indeed, Rice was also involved in programming and personnel matters. ID, paras. 172-174.

22. The Licensees' Exceptions primarily challenge the ALJ's credibility findings concerning the testimony relating to Rice's involvement. However, it is well settled that the credibility findings of the ALJ who actually heard the witnesses should be affirmed in the absence of compelling circumstances warranting their reversal. See, e.g., WHW Enterprises, Inc. v. FCC, 753 F. 2d 1132, 1141 (D.C. Cir. 1985); Conair Corporation v. NLRB, 721 F. 2d 1355, 1367-68 (D.C. Cir. 1983); Tri-State Broadcasting Co., Inc., 5 FCC Rcd 1156, 1170 (Rev. Bd. 1990). Moreover, the Licensees have failed to establish any basis for rejecting the ALJ's credibility findings. This is particularly so because the circumstances as found by the ALJ are consistent with what one could logically expect from a situation in which hired employees are ostensibly left to manage stations without the supervision of the owner as a result of serious criminal charges. As noted, Rice's partial exclusion from management ultimately reflected his wishes since he had the legal right to assert full control had he wished to do so. It is therefore not surprising that he did not wholly disregard the management arrangements that existed at his sufferance. Nonetheless, it is logical to suppose that he would not remain wholly uninvolved as to matters concerning the stations he owned where he felt that his intervention was necessary or feasible. Nor is it surprising that his hired managers could not successfully monitor and prevent such involvement.

23. The Licensees at paragraphs 46-47 of their Exceptions object to the ID's "inference" that, because certain events happened after Rice discussed them with certain employees, they happened because of those conversations. However, as reflected at paragraph 174 of the ID, the ALJ's conclusions were premised on Rice's involvement in directing the employees in question to take certain personnel actions, not necessarily on the outcome of Rice's

directions. The Licensees initially claimed that Rice had "absolutely no managerial, policy, or consultative role" in the stations' affairs. ID, para. 34. The Licensees never meaningfully updated this representation. In any event, the Licensees finally claimed that Rice had "been excluded from involvement in the customary managerial, policy, and day-to-day decisions and operations of" the stations. ID, para. 38. The level of involvement demonstrated in Rice's contacts with station employees cited in the ID is inconsistent with these representations, irrespective of whether Rice's directions were the sole cause of subsequent outcomes consistent with Rice's intentions. For instance, the Licensees at paragraph 46 of their Exceptions cite the circumstances surrounding the discharge of Janice Pratt. They claim that her firing was the result of directions from a hired manager rather than Rice. However, the possibility that another manager independently directed the firing of Pratt does not contradict testimony that Rice also gave directions to the same effect. See ID, paras. 90-92. Such involvement by Rice would be inconsistent with the Licensees' representations concerning his role, irrespective of whose directions actually resulted in Pratt's termination.

24. The Licensees contend at paragraph 48 of their Exceptions that they could not in any event be held accountable for any misrepresentations because the managing employees, including Janet Cox, had no knowledge of Rice's contacts with certain other employees. On the other hand, the Licensees assert at footnote 10 of their Exceptions, associated with paragraph 48, that Rice, their sole stockholder, cannot be held accountable for any misrepresentation because he was excluded from management-level responsibility. As a result, the Licensees are, in effect, urging that no one is accountable for the accuracy of their representations. This is patently absurd and must be rejected. In any event, Janet Cox was at least aware of the need to update

the Licensees' reports after Rice was released from the hospital. However, no unambiguous update was provided and the ALJ properly rejected Cox's "strained and irrational" attempt to explain this failure. ID, paras. 167-69. Moreover, insofar as Cox purported to be the person ultimately responsible for the Licensees' operations, it was clearly her responsibility to monitor and control the actions of Rice. It appears that her efforts to discharge this responsibility were, at best, seriously deficient. ID, p. 30, n. 17.

25. Finally, the Licensees urge that there is no basis for inferring an intent to deceive because they had no reason to believe that the reports concerning the exclusion of Rice might forestall a "Commission inquiry or investigation" arising from Rice's misconduct. The Licensees note that at the time of Rice's convictions they filed, prior to designation, a "Brief in Opposition to Commencement of Revocation or Evidentiary Hearing." Licensees' Exceptions at para. 51 and n. 11. The filing of the Brief, which relied heavily on the exclusion of Rice, as noted in the OSC, obviously reflected that the Licensees harbored a hope that a revocation hearing could be avoided. The need for full disclosure of the facts concerning Rice's involvement would have been evident at least when they filed the Brief. However, such disclosure was not made. In any event, the reports, filed during the period between Rice's arrest and his conviction, were a necessary predicate to the strategy implemented by the Brief. Thus, the initial reports filed after Rice's arrest referenced CPS-2. ID, paras. 32-33. This reflected the Licensees' awareness of the potential impact of the arrest on their qualifications. Further, Janet Cox indicated that the continued exclusion of Rice during the period from his release from the hospital until his conviction was premised in part on "regulatory" concerns. ID, para. 42. Accordingly, the purported exclusion of Rice was a principal component of the Licensees' efforts to avoid a

hearing from the time of his arrest. They had a clear motive to conceal facts that would raise a question as to whether Rice had in fact been effectively excluded. The Licensees have evidenced a willingness to deceive the Commission that provides an independent basis for revocation of their authorizations. FCC v. WOKO, Inc., 329 US 223, 227 (1946).

D. Revocation of the Licensees' Authorizations is not Subject to Review under the Eighth Amendment

26. Lastly, the Licensees argue that revocation of the five licenses and two construction permits violates the excessive fines clause of the Eighth Amendment.² They request that the Commission review the ALJ's decision in this regard and, at most, impose a monetary forfeiture. In support of their request, the Licensees argue that the Commission is bound by the Supreme Court decision in Austin v. United States, 509 U.S. 602 (1993). In that case, the federal government initiated a civil in rem forfeiture proceeding against the body shop and mobile home of petitioner Richard Lyle Austin after his sentencing for possession of cocaine with the intent to distribute in violation of South Dakota's drug laws. The Court decided that the excessive fines clause of the Eighth Amendment applies to forfeitures of property under 21 U.S.C. Sections 881(a)(4) and (a)(7). These statutes provide for the forfeiture of both real and personal property which were used to facilitate the transportation, sale, receipt, possession or concealment of controlled substances, their raw materials, and equipment used in their manufacture and distribution.

27. In reaching its decision, the Court opined that such forfeitures have been justified on two theories: (1) that the property itself is "guilty" of the offense; and (2) that the owner may

² "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Constitution, Amendment 8.

be held accountable for the wrongs of the others to whom he entrusts his property. The Court further explained that the justification for the forfeiture is a "fiction" that the thing is primarily considered the offender.³ The Court then turned to decide whether forfeitures under Sections 881(a)(4) and (a)(7) constituted punishment, thus making it subject to review under the Eighth Amendment. The Court concluded that even if the statutes at issue were only punitive in part, and remedial in part, it would nonetheless constitute punishment within the purview of the Eighth Amendment. The Court therefore reversed the judgment of the Court of Appeals which had affirmed the District Court's ruling that the Eighth Amendment was inapplicable to in rem civil forfeitures and, thus, forfeiture of Austin's property did not violate the excessive fines clause of the Eighth Amendment. The Supreme Court remanded the case for further proceedings consistent with its opinion.

28. We disagree that the Court's ruling in Austin must guide the result in this case. The civil forfeiture statutes discussed in Austin evolved from maritime law where they were used to effectuate in rem forfeitures for violations of customs and revenue laws.⁴ Although such forfeitures have since been used for various purposes, the most common use recently has been in the area of drug abuse prevention. The statutes serve a number of goals, including deterrence, punishment and as a source of revenue for drug enforcement initiatives. Section 312 of the Communications Act of 1934, as amended, is not such a forfeiture statute. Section 312 provides for the revocation of any station license or construction permit because of conditions which

³ Austin at 615, citing J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511, 41 S. Ct. 189, 191 (1921).

⁴ See generally, Harmony v. United States, 43 U.S. (2 How.) 210, 11 L.Ed. 239 (1844); The Palmyra, 25 U.S. (12 Wheat.) 1, 6 L.Ed. 531 (1827).

would warrant refusal of the grant of a license or permit on an original application or for willful failure to observe any provision of the Communications Act or Commission rule. Thus, Section 312 allows the Commission to take appropriate action where it has been determined that a licensee has failed to operate in the public interest. In determining what action is appropriate, the Commission typically "enjoys broad deference on issues of both fact and policy" when making its public interest judgement under the Communications Act. Syracuse Peace Council v. FCC, 867 F.2d 654, 276 U.S. App. D.C. 38 (1989).

29. In any event, the revocation of licenses and construction permits is not the type of civil in rem forfeiture discussed by the Supreme Court in Austin. The nature of a broadcast license is unlike that of the Austin body shop and mobile home. Here, Rice does not "own" the frequencies for which he holds licenses. Section 301 of the Communications Act of 1934, as amended. Thus, he has no right to hold the licenses in perpetuity.⁵ Rather, Rice is a fiduciary. Licensees are permitted use of the frequencies for which they hold licenses so long as they can demonstrate to the Commission's satisfaction that they do so consistent with the "public interest, convenience and necessity."⁶ Rice has failed in that regard. Unlike Austin, the "property" at issue in the case at bar has always belonged to the public. Grant of the Licensees' broadcast applications did not convey an ownership interest. The loss of the licenses and permits is not a forfeiture.

⁵ The ID does not impact Rice's ownership of the broadcast facilities, buildings, towers and other implements of his collective stations. They remain in his possession.

⁶ Communications Act of 1934, as amended, 47 U.S.C. Sections 307(a), 309(a); Office of Communication of United Church of Christ v. FCC, 359 F.2d 944 (D.C. Cir. 1966).

30. In furtherance of their request for a monetary forfeiture in lieu of revocation, the Licensees cite United Broadcasting Co., 100 FCC 2d 1574, 1585 (1985) for the proposition that "sanctions for broadcast misconduct should be reasonably tailored to deter misconduct by the involved broadcaster and others." The Bureau disagrees that a monetary forfeiture is in any way sufficient to address the egregiousness present in this case. In our view, a monetary forfeiture would trivialize the crime that Rice has committed against the communities he is licensed to serve. In citing United, it is apparent that the Licensees would have the Commission disassociate the misrepresentations and lack of candor from the underlying felony conviction. As the ALJ noted in the ID, "[t]his misrepresentation and lack of candor was a direct result of Rice's criminal misconduct. Had there been no such misconduct, the Licensees would have had no need to submit to the Commission reports which misrepresented facts and lacked candor." ID, para. 154. Further, in light of Rice's felony convictions and the misrepresentations and lack of candor by the owner and officers of the Licensees, the Commission should not, based on United, find that revocation is "excessive and contrary to the public interest." Unlike United, in this instance there is no plausible system of internal or external controls that could be designed to address the problems which led to the violations. United at 1584.

31. Finally, the Bureau disagrees that the impact on the 57 persons employed by the Licensees should be of paramount concern to the Commission. While any adverse impact on those individuals is regrettable, the Commission should not be swayed by those incidental considerations.